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No. 87-246

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

L.E. MYERS COMPANY, PETITIONER

v.

DENNIS E. WHITFIELD, DEPUTY SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly allocated the burden of persuasion in an enforcement action under the Occupational Safety and Health Act, where the issue was whether the violation of a mandatory occupational safety standard was the result of employee misconduct that was not foreseeable through the exercise of reasonable diligence.

2. Whether the court of appeals correctly held that the mandatory occupational safety standard set forth at 29 C.F.R 1926.105(a) "indicates" the need for employees to wear safety belts when working more than 25 feet above the ground, for purposes of establishing a violation of the general construction industry personal protective equipment standard, 29 C.F.R. 1926.28(a).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Austin Building Co. v. *OSHRC*, 647 F.2d 1063 (10th Cir. 1981) 9
Brennan v. *OSHRC (Alsea Lumber Co.)*, 511 F.2d 1139 (9th Cir. 1975) 5, 7, 8
Brennan v. *Southern Contractors Service*, 492 F.2d 498 (5th Cir. 1974) 14
Brock v. *L.R. Willson & Sons, Inc.*, 773 F.2d 1377 (D.C. Cir. 1985) 14
Capital Electric Line Builders, Inc. v. *Marshall*, 678 F.2d 128 (10th Cir. 1982) 7, 8, 9
Danco Construction Co. v. *OSHRC*, 586 F.2d 1243 (8th Cir. 1978) 8, 9
Daniel International Corp. v. *OSHRC*, 683 F.2d 361 (11th Cir. 1982) 7, 8
Forging Industry Ass'n v. *Secretary of Labor*, 773 F.2d 1436 (1985) 9
General Dynamics Corp. v. *OSHRC*, 599 F.2d 453 (1st Cir. 1979) 8
H.B. Zachry Co. v. *OSHRC*, 638 F.2d 812 (5th Cir. 1981) 7, 8
Mountain States Telephone & Telegraph Co. v. *OSHRC*, 623 F.2d 155 (10th Cir. 1980) 7, 8, 9
National Industrial Constructor, Inc., 1981 O.S.H. Dec. (CCH) ¶ 25,404 (1981) 14
Ocean Electric Corp., 1975-1976 O.S.H. Dec. (CCH) ¶ 20,167 (1975) 9
Ocean Electric Corp. v. *Secretary of Labor*, 594 F.2d 396 (4th Cir. 1979) 7, 9
Pennsylvania Power & Light Co., 1983-1984 O.S.H. Dec. (CCH) ¶ 26,518 (1983) 9

Cases—Continued: Page

Pennsylvania Power & Light Co. v. *OSHRC*, 737 F.2d 350 (3d Cir. 1984) 7, 8, 13
Sierra Construction Corp., 1978 O.S.H. Dec. (CCH) ¶ 22,506 (1978) 14
Southern Colorado Prestress Co. v. *OSHRC*, 586 F.2d 1342 (10th Cir. 1978) 14

Statutes and regulations:

Occupational Safety and Health Act of 1970, 29 U.S.C. (& Supp. III) 651 *et seq.*:
§ 5a, 29 U.S.C. 654(a) 10
§ 17(k), 29 U.S.C. 666(k) 3, 6, 10

29 C.F.R.:
Pt. 1926 3
Section 1926.26 13
Section 1926.28(a) 3, 4, 5, 6, 13
Section 1926.105(a) 4, 5, 14
Section 1926.201(a) 13
Section 1926.751 13

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-31) is reported at 818 F.2d 1270. The decision of the Occupational Safety and Health Review Commission (Pet. App. 32-76) is reported at 12 O.S.H. Cas. (BNA) 1609 and 1986-1987 O.S.H. Dec. (CCH) ¶ 27,476 (1986). The decision and order of the administrative law judge (Pet. App. 78-104) is unreported, but is summarized at [1984-1985] O.S.H. Dec. (CCH) ¶ 26,932.

JURISDICTION

The judgment of the court of appeals (Pet. App. 105-106) was entered on May 13, 1987. The petition for a writ of certiorari was filed on August 11, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a corporation that constructs and installs electrical transmission and distribution equipment (Pet. App. 4). In September 1982, a fatal accident occurred at a construction project near Cincinnati, Ohio, where petitioner was installing electrical insulation over high-voltage power lines running between a 47-foot terminal pole and an 80-foot tower located atop a boiler house (*id.* at 4-5). The installation work was being performed by a company foreman and two linemen who climbed a ladder placed against the tower and slid the insulation hose down onto the energized wires (*id.* at 5-6). The linemen specifically were told by the foreman that they need not bring safety belts to the job and so wore no protective equipment other than rubber gloves and sleeves (*id.* at 6, 8). Shortly after one of the linemen, an apprentice, mounted the ladder and began to work, he unexpectedly fell forward from the ladder and struck an exposed terminus on the power line (*id.* at 7-8). The apprentice was instantly electrocuted, and the other lineman, who was standing on a lower rung of the ladder, fell backward onto the roof, suffering broken ribs and other injuries. The foreman, who had been observing from a corner of the roof, was unharmed (*id.* at 8-9).

Following the accident, an investigation was conducted by a compliance officer of the Occupational Safety and Health Administration (OSHA). OSHA issued several citations against petitioner for serious and non-serious violations of OSHA mandatory safety standards.[1] Pet.

[1] A "serious" violation occurs "in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation" (§ 17(k), 29 U.S.C. 666(k)). The statute defines only serious violations, creating by implication a residual category of "other than serious" violations.

App. 2. Among these was a citation for a serious violation of 29 C.F.R 1926.28(a), the general personal protective equipment standard for the construction industry, based on the failure of petitioner's employees to use safety belts while exposed to a potential fall of 75 feet (Pet. App. 3-4).[2]

2. a. At a hearing before an administrative law judge (ALJ) of the Occupational Safety and Health Review Commission (OSHRC), petitioner "concede[d] that the [safety] equipment was not in use at the time but assert[ed] this failure was a direct violation of [petitioner's] safety rules, was unknown to [petitioner] and could not have been reasonably anticipated" (Pet. App. 95-96). The ALJ understood this argument as "the defense of 'unavoidable employee misconduct' " (*id.* at 96).[3] Accordingly, the hearing focused on the nature and implementation of petitioner's safety effort (*id.* at 10).

Evidence adduced at the hearing "revealed a safety program at Myers which looked good on paper but was routinely disregarded in practice in the Cincinnati district" (Pet. App. 10). The formal program required safety manuals for both supervisory and non-supervisory

[2] 29 C.F.R 1926.28(a) provides:

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part [29 C.F.R. Pt. 1926—Safety and Health Regulations for Construction] indicates the need for using such equipment to reduce the hazards to the employees.

[3] The ALJ held that such a defense requires the employer to demonstrate (1) the existence of an effective safety program, (2) communication of that program to the employees, and (3) enforcement of safety rules through appropriate supervision and discipline (Pet. App. 96).

employees, regular safety meetings between foremen and workers at the worksite, individual pre-job discussions of safety matters, reports on safety meetings to the company's safety supervisor, and a progressive system of discipline for safety infractions (*id.* at 10-11). At the hearing, however, various supervisors and employees testified that such meetings rarely if ever occurred and reports were only sporadically filed (*id.* at 10-12, 98). No evidence was produced that the workers involved in this accident ever received safety manuals or attended safety meetings, and it was conceded that there had been no specific discussion of safety matters before this job began (*id.* at 10-12). Indeed, not only did the foreman here instruct the linemen not to wear belts and neglect to wear one himself, but the company's district manager was reputed to have said that "good" linemen did not need safety belts because they just "get in the way" (*id.* at 13-14, 99).

The ALJ found that the evidence at the hearing "support[ed] a conclusion that [petitioner's] safety program was not effectively communicated or enforced" (Pet. App. 98-99). Accordingly, the ALJ concluded that petitioner "ha[d] failed to establish its defense of 'unavoidable employee misconduct' " and affirmed the citation (*id.* at 99). Since evidence of the failure of petitioner's employees to wear safety belts at the time of the accident was clear and undisputed, the ALJ affirmed the citation and assessed a civil penalty of $720.00 (*id.* at 95, 99, 104).

b. The OSHRC, on review, vacated the citation (Pet. App. 14-15, 63-67). Pursuant to 29 C.F.R. 1926.28(a), the Commission found that the Secretary of Labor had proved (i) the existence of a fall hazard warranting the use of safety belts, and (ii) that the mandatory safety standard set forth at 29 C.F.R. 1926.105(a) "indicates" the need for safety belts where the workplace is more than 25 feet

above the ground.[4] The Commission then focused on what it regarded as the third element of the violation under 29 C.F.R. 1926.28(a): "the Secretary must prove that the employer failed to 'requir[e] the wearing of' the prescribed safety equipment" (Pet. App. 63). After reviewing the evidence on petitioner's safety program and its implementation, the OSHRC found that petitioner "did require its employees to use safety belts" (*id.* at 64). The Commission believed that the Secretary had to show that petitioner " 'caused, or at least knowingly acquiesced in [the] violation' " (*id.* at 67, quoting *Brennan* v. *OSHRC*, 511 F.2d 1139, 1144 (9th Cir. 1975)) and determined that "the Secretary did not make such a showing" (Pet. App. 67). Accordingly, the Commission vacated the citation.

3. The Sixth Circuit reversed the Commission, explaining at the outset of its opinion that it agreed with the Secretary's contention that "the Commission's decision is not supported by substantial evidence and did not adequately articulate its reasons for failing to credit the findings of the ALJ" (Pet. App. 2). The court went on to respond "seriatim" (*id.* at 16) to the two arguments raised by the Secretary on appeal—improper allocation of burden of proof and the absence of substantial evidence to support the Commission's decision.

Addressing first the burden of proof issue (Pet. App. 16-29) the court discussed the divided circuit court precedent on the question whether "the Secretary carries the burden of proving the insufficiency of that [safety] program" (*id.* at 21, 22-24). It concluded that the proper rule "is to regard a claim of unfor[e]seeable employee misconduct as an affirmative defense to be proved by the employer after the Secretary has made out a *prima facie*

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[4] 29 C.F.R. 1926.105(a) provides:

> Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

case of a violation of the Act" (*id.* at 24-25 (~~emphasis~~ Italics in original)).[5] The court stated that the Secretary must first establish a prima facie case of the employer's awareness of a "potentially preventable hazard" by, for example, showing "the employer's failure to provide adequate safety equipment or to properly instruct its employees on necessary safety precautions" (*id.* at 22-25, 27). An employer wishing to defend against a citation on grounds of employee misconduct, according to the Sixth Circuit, must then bear the burden of demonstrating by a preponderance of the evidence that it has an adequate and thorough safety program that is communicated to employees and enforced in practice (*id.* at 28).

In a separate section dealing with the Secretary's substantiality of the evidence argument (Pet. App. 29-31), the court of appeals went on to find that "the Commission chose to accept [petitioner]'s evidence as to the adequacy of its written safety program while selectively ignoring testimony, credited by the ALJ, which showed that the program *in practice* * * * was not only ignored, but actively disregarded" (Pet. App. 30 (footnote omitted; emphasis in original)). Because "[t]he Commission gave no reasons for its failure to accept the factual findings [of] the ALJ" (*ibid.*), the court of appeals stated that the OSHRC's conclusion was not "supported by substantial evidence and it will therefore be reversed" (*id.* at 30-31).

ARGUMENT

Petitioner challenges the conclusion of the Sixth Circuit that the employer bears the burden of proving that the

[5] The Sixth Circuit treated "unforeseeable employee misconduct" (Pet. App. 24-25) as a generic issue under the Occupational Safety and Health (OSH) Act. It did not refer specifically to Section 17(k)'s definition of a serious violation nor did it analyze the text of 29 C.F.R. 1926.28(a), the regulation petitioner was found to have violated.

violation of a mandatory safety standard was the result of unforeseeable employee misconduct. We agree that there is a significant and continuing conflict on this burden of proof issue among the courts of appeals, and that the issue may well require resolution by this Court. This case, however, does not appear to be an appropriate vehicle for consideration of this question. While the matter is not free from doubt, we do not believe that the issue on which the lower courts are divided is actually dispositive here. We therefore believe that certiorari should be denied.[6]

1. As petitioner and the Sixth Circuit accurately observe (Pet. 13-20; Pet. App. 22-23), the courts of appeals have adopted a variety of inconsistent positions on the issue of whether, and to what extent, an employer bears an evidentiary burden when the issue of employee misconduct arises in an OSHA enforcement proceeding. Four circuits have taken the position that the Secretary, in seeking to establish a violation of an OSHA standard, has the burden of persuasion to show that any employee misconduct giving rise to the violation was reasonably foreseeable.[7] Five circuits, including the court of appeals in this case, have taken contrary positions, holding that unforeseeable employee misconduct is essentially an affirmative defense on which the cited employer must bear the burden of persuasion.[8]

[6] Question 2, concerning the interpretation of a particular OSHA regulation, presents no conflict in the circuits and plainly does not merit this Court's attention.

[7] See *Pennsylvania Power & Light Co.* v. *OSHRC*, 737 F.2d 350 (3d Cir. 1984); *Capital Electric Line Builders, Inc.* v. *Marshall*, 678 F.2d 128 (10th Cir. 1982); *Mountain States Telephone & Telegraph Co.* v. *OSHRC*, 623 F.2d 155 (10th Cir. 1980); *Ocean Electric Corp.* v. *Secretary of Labor*, 594 F.2d 396 (4th Cir. 1979); *Brennan* v. *OSHRC*, (*Alsea Lumber Co.*), 511 F.2d 1139 (9th Cir. 1975).

[8] See *Daniel International Corp.* v. *OSHRC*, 683 F.2d 361 (11th Cir. 1982); *H.B. Zachry Co.* v. *OSHRC*, 638 F.2d 812 (5th Cir. 1981);

Further variations exist among the courts within each of these groupings. With respect to those placing the burden on the Secretary, the Tenth Circuit's decisions in *Mountain States Telephone & Telegraph Co.* v. *OSHRC*, 623 F.2d 155 (1980), and *Capital Electric Line Builders, Inc.* v. *Marshall*, 678 F.2d 128 (1982), appear to impose upon the Secretary the sole burden of producing evidence on the issue of employee misconduct, while the Third and Ninth Circuits would require the employer to bear the burden of producing rebuttal evidence (though *not* the burden of persuasion) where the Secretary has made a prima facie showing of the foreseeability of the violation. See *Pennsylvania Power & Light Co.* v. *OSHRC*, 737 F.2d 350 (3d Cir. 1984) (burden of persuasion does not shift to the employer, at least where the inference of employer knowledge is raised only by the Secretary's proof of a supervisor's misconduct); *Brennan* v. *OSHRC (Alsea Lumber)*, 511 F.2d 1139 (9th Cir. 1975).

Among those circuits placing the burden on the employer, the First, Fifth and Eleventh Circuits require employers to prove that the employee's actions were an unforeseeable departure from the employer's uniformly and effectively enforced work rules, and make no mention of any related evidentiary burden on the Secretary. See *Daniel International Corp.* v. *OSHRC*, 683 F.2d 361, 364 (11th Cir. 1982) (employee misconduct an "affirmative defense"); *H.B. Zachry Co.* v. *OSHRC*, 638 F.2d 812 (5th Cir. 1981); *General Dynamics Corp.* v. *OSHRC*, 599 F.2d 453 (1st Cir. 1979). The Eighth and (in this case) Sixth Circuits, by contrast, appear to require the Secretary to establish a prima facie case of employer knowledge of the violation before the burden of persuasion on the unforeseeability of the employee conduct shifts to the

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General Dynamics Corp. v. *OSHRC*, 599 F.2d 453 (1st Cir. 1979); *Danco Construction Co.* v. *OSHRC*, 586 F.2d 1243 (8th Cir. 1978).

employer. See *Danco Construction Co.* v. *OSHRC*, 586 F.2d 1243 (8th Cir. 1978).[9]

Employee misconduct is commonly alleged in response to OSHA citations, and cases in which the facts are close, including those in which the record is unclear, often will turn on the burden of persuasion. Uncertainty among the circuits, and confusion in the OSHRC's own decisions,[10] leaves participants without clear guidance on the way in which proceedings, evidence and pleadings are to be structured. Moreover, there does not, at present, appear to be any clear trend nor any basis for harmonizing the differences among the circuits in placing the burden of proof on the issue of foreseeability of employee misconduct.

Moreover, the proper allocation of the burden of proof on employee misconduct is an important part of the OSH Act's substa· ·ve scheme. Unforeseeable employee mis-

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[9] The picture is further confused by internal disharmony in the language used in the opinions in two circuits. The Tenth Circuit's observation, in *Austin Building Co.* v. *OSHRC*, 647 F.2d 1063, 1068 (1981), that an employer cited for an OSHA violation "may defend by showing that the violation was an unforeseeable occurrence," seems not to reflect the position, implied in *Capital Electric* and *Mountain States*, that an employer has no evidentiary burden on that issue. Similarly, the holding of a Fourth Circuit panel in *Ocean Electric* that the Secretary retains the burden of proof in employee misconduct cases may be undercut by a later dictum by the full court stating that "the employer has available the *defense* of 'unforeseeable employee misconduct.' " *Forging Industry Ass'n* v. *Secretary of Labor*, 773 F.2d 1436, 1450 (1985) (en banc) (emphasis added).

[10] Compare, *e.g.*, the OSHRC decision in this case (burden of proof placed solely on the Secretary), with *Pennsylvania Power & Light Co.*, 1983-1984 O.S.H. Dec. (CCH) ¶ 26,518 (1983) (after the Secretary establishes a prima facie case of employer knowledge, the burden shifts to the employer to prove "that it had done everything reasonably possible to avoid a violation"), and with *Ocean Electric Corp.*, 1975-1976 O.S.H. Dec. (CCH) ¶ 20,167 (1975) (employer bears the burden of proving unforeseeability of the employee's unsafe conduct).

conduct should be treated as an affirmative defense,[11] not only because it appears in Section 17(k) as an exception to the definition of a serious violation but also because that allocation of the burden of persuasion is an integral part of the OSH Act's over-all program (29 U.S.C. 666(k)). The Act operates by placing responsibilities on employers, who bear the twin burdens of a general duty to furnish a workplace free of recognized hazards and a specific duty to observe mandatory standards promulgated by the Secretary (29 U.S.C. 654(a)). The Act places obligations on employers because of the underlying presumption that, absent unusual events, the employer is in command of the workplace. If the employer is presumed to be in command of the workplace, then as an evidentiary matter the burden properly rests on the employer to show that in a particular case a violation was the result of unforeseeable departures from its well enforced safety program. Accordingly, for reasons of legal clarity and substantive OSH Act policy, this question appears to be one meriting this Court's attention.

2. The more difficult question is whether the outcome of this case turns on the resolution of the conflict on that issue. Although the matter is not free from doubt, we believe that the result in this case would be the same no matter who bears the burden of persuasion. It does not appear that the Sixth Circuit would have decided the case differently under a different view of the burden, nor are any

[11] Because we believe that unforeseeable employee misconduct is properly an affirmative defense, we disagree with the Sixth Circuit here to the extent that the court imposed on the Secretary the burden of establishing a prima facie case of employer knowledge by presenting evidence showing "the employer's failure to provide adequate safety equipment or to properly instruct its employees on necessary safety precautions" (Pet. App. 27 (citations omitted)).

further proceedings in this case called for that would be affected by the resolution of the conflict.

a. In this case, the ALJ found that the employer had "failed to establish its defense of 'unavoidable employee misconduct' " (Pet. App. 99) largely because the evidence indicated that "[petitioner's] safety program was not effectively communicated or enforced" (*id.* at 102). The OSHRC, to the contrary, found "no evidence in the record" indicating that the employee misconduct here "was reasonably foreseeable to or preventable" by petitioner (*id.* at 65-66). The court of appeals, in turn, held the Commission's failure to accept the ALJ's factual findings to be unsupported by any stated reasons or by substantial evidence in the record, and on that account reversed (*id.* at 30-31).

The court of appeals appears to have endorsed the factual findings of the ALJ—most relevantly those pertaining to the foreseeability or preventability of employee misconduct—and rejected the OSHRC's reformulation of them. The burden of proof issue would be determinative only where the evidence is in equipoise. As the ALJ's opinion shows, however, the evidence that petitioner did not enforce its safety rules on this case is extremely strong (Pet. App. 97-99). Moreover, the court's opinion does not suggest in any way that it viewed the question as a close one. Nor does the court purport to rely on its burden of proof analysis as being in any way dispositive of the outcome. We thus believe that that analysis is, in fact, dictum, and its elimination or alteration would not alter the outcome of the case.

With due caution, however, we must note that this conclusion is not unassailable. Strictly speaking, the opinion states that the OSHRC's conclusion was not supported by substantial evidence, not that the contrary conclusion was correct. Moreover, the court of appeals characterized the OSHRC's conclusion two different ways, once as a simple

factual finding (Pet. App. 14-15) and once as a finding explicitly tied to the issue raised in this petition: "[t]he Commission concluded that the Secretary failed to sustain his burden of proving a violation of § 1926.28(a)" (*id.* at 15). It is thus conceivable that the Sixth Circuit thought the factual question close enough to be affected by its placing of the burden of persuasion on the employer.

b. The court of appeals' burden of persuasion analysis is also integral to its holding if it is contemplated that the case is to be remanded to the OSHRC for further proceedings concerning whether the citation is to be upheld.[12] In our view, however, the court of appeals' judgment concludes the issue of the citation's validity and that court did not intend for the case to be returned to the OSHRC, save possibly for an order imposing a civil penalty and setting an abatement date.

Neither the opinion nor the judgment of the court of appeals indicated that the case was to be remanded, and there is nothing in the circumstances surrounding the case to suggest that the court nonetheless intended further proceedings on the matter. The ALJ, in his report to the OSHRC, "affirmed" the citation ("Serious Citation No. 1, item 2") and assessed a penalty of $720.00 (Pet. App. 104). The OSHRC "vacated" the citation (*id.* at 76, 67). The court of appeals' judgment provided that "the decision of [the OSHRC] in this cause be and the same is hereby reversed" (*id.* at 106; see also *id.* at 31). The reversal of that decision would appear to adopt the position recommended in the ALJ's report, which was to affirm the citation. Thus, it appears that the Sixth Circuit's judgment

[12] If the case must return to the OSHRC for a re-weighing of the evidence under the correct standard, it is still possible that the burden would not matter. The Commission might find, and the court of appeals might agree, that the evidence is clear. Thus, this Court might want to decline to grant review on an issue that might or might not ultimately decide the case.

leaves no room for further inquiry by the OSHRC into the validity of the citation and hence presents no occasion for future application in this case of that court's burden of persuasion analysis.[13]

We are frank to say, however, that this conclusion also is not free from doubt. The court of appeals' discussion of burden of proof, while not long, occupies a major portion of its opinion. Moreover, it is written in a manner to serve as a useful guide for proper proceedings on remand, and its presence is difficult to account for if, as we believe, it is dicta. More generally, it is frequent practice to remand to an adjudicatory body for further proceedings after its reasoning is found wanting in some respect.

c. In summary, we believe this case is not certworthy because it is far from clear that the important burden of proof issue discussed in the court of appeals' opinion plays any part in the disposition of the case. Should the Court disagree on that point and find it clear that the question needs to be addressed, we suggest that it would be appropriate to grant the petition with respect to the burden of proof issue.[14]

[13] The court of appeals here nowhere mentioned a remand. There is precedent for a court's reversing the OSHRC's decision on an issue without remanding to the agency on that question (*Pennsylvania Power & Light* v. *OSHRC*, 737 F. 2d at 358).

[14] The language of 29 C.F.R. 1926.28(a), making the employer "responsible for requiring" the use of appropriate protective equipment, might pose a further obstacle to review by this Court, were it read simply to demand the formulation of certain rules by the employer. While this language does differ from some other OSHA standards which simply demand that certain safety requirements be met (see, *e.g.*, 29 C.F.R. 1926.26 (illumination at construction cites), 1926.105 ("safety nets shall be provided * * *"), 1926.201(a) (signaling by flagmen), 1926.751 (structural steel assembly)), we are aware of no instance in which it has been construed only to require the promulgation of rules by the employer. More specifically, petitioner has not made that argument in this case and does not do so now.

3. We oppose the petition for a writ of certiorari on the question whether 29 C.F.R 1926.105(a) "indicates" that safety belts are needed for workers at elevations more than 25 feet above the ground. The Sixth Circuit's affirmance of the OSHRC's holding on this point is correct and does not conflict with a decision of any other circuit, and is congruent with appellate and Commission precedent interpreting Section 1926.105(a) to require use of safety belts whenever such belts would provide effective fall protection. See *Brock* v. *L.R. Willson & Sons, Inc.*, 773 F.2d 1377 (D.C. Cir. 1985); *Southern Colorado Prestress Co.* v. *OSHRC*, 586 F.2d 1342 (10th Cir. 1978); *Brennan* v. *Southern Contractors Service*, 492 F.2d 498 (5th Cir. 1974); *National Industrial Constructor, Inc.*, 1981 O.S.H. Dec. (CCH) ¶ 25,404 (1981); *Sierra Construction Corp.*, 1978 O.S.H. Dec. (CCH) ¶ 22,506 (1978). The issue accordingly does not warrant the attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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